Dispelling The #1 Myth Of Asset Protection:
Why You Can Lose Assets In A Medical Malpractice Lawsuit

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As consultants to hundreds of physicians, including neurologists and neurosurgeons, we encounter many misconceptions about asset protection planning every day. In this article, we will address the most important of all misconceptions regarding asset protection: that this area of planning is not important. The thinking of many physicians around the country, and unfortunately their advisors as well, is that there is little to any risk of a physician losing their personal assets in a malpractice claim, especially if there is $1-3 million malpractice insurance coverage.

There are a number of key issues in this analysis to review. We will take each one individually:

FINDING PROPER DATA IS DIFFICULT

Those of you who have spoken to us, or read our book For Doctors Only or other articles, you know that we are not people who use extremes. Like you, we like to see data before making judgments or forming opinions. However in this area, tracking how many physicians lose personal assets in malpractice actions is very difficult, if not impossible to obtain. That is because the legal system publishes filed cases and judgments rendered, but they do not publish the collections of those judgments.

There are no reporters that publish what happens once a judgment is rendered. Did the plaintiff, with a judgment in excess of coverage limits, simply settle for the amount of the medical malpractice insurance? Did the plaintiff and his attorney pursue the personal assets of the physician and his family to satisfy any excess judgments? These are questions for which there are no answers in the published materials.

Every week in the malpractice reporters we review, there are dozens of malpractice actions decided in the states where we practice. Most decisions are for the physician defendant, and there are some are small judgments for the plaintiff, but every week there are very large judgments for the plaintiff. This may be the same in your location as well. Nonetheless, we can only hypothesize about what will occur once these very large judgments are rendered. It seems that many physicians and their advisors simply assume that their plaintiffs in these cases will walk away from very large judgments and simple settle for the malpractice insurance coverage. Let’s look at a couple of reasons why this may not be so.

PAYMENTS, NOT EVICTIONS

A common theme in speaking to physicians and their advisors around the country on this topic seems to be that “I have never personally heard of anyone losing their home to a lawsuit,” and therefore the conclusion is that it doesn’t happen. However, if one understands the goal of litigation and the plaintiffs, this certainly isn’t surprising. What does occur instead of eviction is that the plaintiff with the judgment will file a lien on real estate, levy bank accounts, and essentially put levies or liens on any assets of the physicians to the amount of the judgment owed to them. The goal is not to kick the physician out of their home, but make the doctor take a loan against the home to pay off the excess judgment. And this, we can assure you, happens with regularity.

Consider this situation: a true story from David’s former law practice. In New York, I had a couple come to see me. He was a Cardiologist and she an OB/GYN. They said that she, the OB/GYN, had just been successfully sued for a bad baby case in which the judgment rendered against her was $4 million, $2 million more than her personal malpractice coverage. I told him at the time that there was nothing I could do since there was already a judgment. While I have not spoken to the client since, I ask you, do you think that
the plaintiff and their attorney who rightfully won a $4 million judgment would simply settle for the $2 million of insurance coverage when they could put a lien on the $1.5 million of equity in the defendant’s home in a matter of two hours with the cost to the attorney being about $500?

**THE LEGAL OBLIGATION OF THE PLAINTIFF ATTORNEY: GET THE CASH**

There seems to be an underlying assumption by attorneys who advise doctors that asset protection isn’t important that plaintiffs and their attorneys will not go after physicians’ personal assets because it is “distasteful” or for some other reason. But put yourself in the shoes of the plaintiff and the attorney. The plaintiff’s attorney has a professional and ethical obligation to represent his or her client with their best interest to the fullest extent of the law. If, as an attorney, David represented a plaintiff who had a $4 million judgment and only $2 million was paid by insurance and he knew that the defendant had millions of dollars of assets that were unprotected that he could attack in order to get the client paid in full, David would have to do this. In fact, if he didn’t pursue those assets, he would be liable for malpractice to the client, and rightfully so.

When you combine the misconception of physicians that plaintiffs and attorneys won’t go after their assets because of some kind of ethical consideration with the fact that there are, in fact, ethical rules requiring an attorney to go after such assets, you can understand why the advice “you don’t need asset protection” is so off-base.

**WHY WOULDN’T YOU PROTECT ASSETS?**

If you have ever read our materials or heard us speak, you know that we are not people who say the “sky is falling.” Even with all the statements that we made in this article, it is still statistically relatively low risk that you will lose personal assets in a malpractice action, regardless of your specialty. However, the point that we make with our clients and in our books and articles is that asset protection planning can actually benefit you in many ways beyond lawsuit protection.

In fact, most of the asset protection we do for clients is relatively low cost and has numerous financial, tax and estate planning benefits as well. Thus, the question becomes “if asset protection planning can protect you in many ways and can cost relatively little, why wouldn’t you do it...when there is even a slight chance that you will lose personal asset at some time during your career?”

**CONCLUSION**

Certainly, asset protection planning is a crucial part of a client’s wealth planning today – especially for physicians. Everyone acknowledges that there is some risk of a beyond-insurance limits lawsuit for any doctor. If this is true, and proper asset protection may actually help you BUILD wealth, then such planning cannot be ignored. The authors welcome your questions. You can contact them at 877-656-4362 or through their website, www.ojmgroup.com.

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